

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

HAMID “RAY” AKHAVAN, and
RUBEN WEIGAND,

Defendants.

20-CR-188-JSR

**MEMORANDUM OF LAW IN SUPPORT OF HAMID (“RAY”) AKHAVAN’S MOTION
IN LIMINE #7: TO EXCLUDE TELEGRAM AND WHATSAPP CHAT EXTRACTS**

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Defendant Hamid (“Ray”) Akhavan respectfully submits this memorandum of law in support of his motion *in limine* to exclude certain exhibits containing Telegram and WhatsApp chat logs.

PRELIMINARY STATEMENT

The government has listed 40 purported chat logs as exhibit it intends to introduce at trial.¹ Of those chats, 28 have been produced as simply text PDFs with no accompanying native data (Nos. 1-28, the “Eaze Telegram Chats”), nor any certificate otherwise authenticating them as true and correct copies of the conversations they purport to reflect. The next 12 (Nos. 29-40, the “Hargreaves Telegram Chats”) suffer from the same defect (they lack certification or a native file), and in addition either appear to be videos of some unidentified person scrolling through certain portions of a chat log, or pdfs of screenshots cobbled together reflecting partial or incomplete chats. The last set (Nos. 41-49, the “Hargreaves Screenshots”) are what appear to be mostly single page screenshots, some of which are illegible, and all of which appear without critical information to identify their source.

ARGUMENT

I. THE COURT SHOULD EXCLUDE THE EAZE AND HARGREAVES TELEGRAM CHATS

A. The Eaze and Hargreaves Telegram Chats Cannot Be Authenticated

For a document to be used at trial, it must be authentic, relevant and admissible.² The very first and most basic requirement is that “the proponent ... produce evidence sufficient to support a finding that the item is what its proponent claims it is.” Fed. R. Evid. 901(a). With regard to “text messages, and other electronic communications recently sent or received, this is

¹ Annex A is a chart of the proposed chat exhibits.

² The defense notes that these chats are subject to significant hearsay objections, and may be excludable on that basis as well; the defense preserves all such objections for trial.

ordinarily not a difficult task.” *Deptula v. Rosen*, 2020 WL 6135793, at *1 n.1 (S.D.N.Y. Oct. 16, 2020).³ However, “it does require a *specific* attestation, by a person with personal knowledge of the communications, that they are authentic (*i.e.*, that they were actually sent to or received from the indicated person(s)) and that any printout or other version submitted to the court is a true copy of the **original** electronic messages.” *Id.* (second emphasis added). The Government has not, and will almost certainly be unable to later, authenticate the Eaze Telegram Chats.

First, with respect to preservation of an accurate record, Telegram is a particularly suspect messaging medium, and should be viewed with skepticism by the Court. It has been widely publicized that since early 2019—and just before this case was unsealed—Telegram allows users to delete messages from their chat logs, not only for themselves but for others. *See, e.g.*, Vlad Savov, *Telegram adds the option to delete chats on other people’s devices*, The Verge (Mar. 25, 2019), <https://www.theverge.com/2019/3/25/18280593/telegram-chat-delete-purge-messages-app-privacy-update>; Natasha Lomas, *Telegram adds ‘delete everywhere’ nuclear option to private chats—killing chat history*, Tech Crunch (Mar. 25, 2019), <https://techcrunch.com/2019/03/25/going-going-gone/>. In group chats, the administrator, or admin, of the group has the same power. And, in Telegram, “deleted messages do not leave a mark in the chat.” *Frequently Asked Questions*, Telegram (last accessed Feb. 15, 2021), <https://telegram.org/faq#q-can-i-delete-my-messages>. This feature leaves Telegram chat log exports particularly susceptible to revisionist history by any admin or, in the case of bilateral communications, any participant who may feel motivated to sanitize or strategically delete a chat.

³ Unless otherwise noted, we have omitted internal citations, quotation marks, and alterations from citations in this brief.

These purported chat extracts provide no indication of who within the group had admin rights—*i.e.*, there is no way to tell from the documents who was able to delete messages as they saw fit. In some groups, it is not even clear who started the group or who the original participants were, as the chats appear to start midway through the conversation.

Second, 19 of those 28 chats include at least one participant who is listed solely as “Deleted Account,” and some chats contain more than one “Deleted Account,” making it entirely impossible to attribute communications reliably to their source, and inviting speculation and confusion.⁴ Further, the presence of the “Deleted Account” moniker itself renders these chats inauthentic—at the time these messages were sent and received, the individuals participating had to have active accounts, and their names would have been reflected next to messages they sent. These records thus are not, and cannot be, authentic representations of the *original* conversations.

The lack of authenticity is further bolstered by the absence of images and attachments,⁵ and the inability to view linked responses—all features of a complete and authentic chat log that are absent from the Eaze Telegram Chats.

The Hargreaves Telegram Chats fare no better. Here again, there is the possibility that communications were deleted by parties to the various chats, leaving no trace of their deletion. And again, certain of these chats contain deleted accounts.⁶ Further, the method of capture used by the government appears to be scrolling through the chat or producing PDFs of what appear to

⁴ *E.g.*, GX304, 306, 307-322, 324.

⁵ *E.g.*, GX321, at 8 (original image not viewable); GX306, at 10 (same); GX322, at 4 (embedded link not accessible).

⁶ GX4001–02; GX4007–08.

be screenshots of the same. This method presents its own authenticity challenges as embedded content is clearly lost.⁷

B. The Eaze and Hargreaves Telegram Chats Raise Clear Confrontation Clause Concerns

The Eaze and Hargreaves Telegram Chats also raise confrontation clause issues. As the Court has recently recognized, if the “primary purpose” of a communication, “is to establish or prove past events potentially relevant to later criminal prosecution,” that evidence is testimonial. *Davis v. Washington*, 547 U.S. 813, 822 (2006). The defendant must be permitted to cross-examine the *declarant* of testimonial evidence.

Here, the Eaze and Hargreaves Telegram Chats contain myriad identified participant-declarants who have not been listed as a witness by either party, and who are not expected at trial, to say nothing of the various “Deleted Account” participants who cannot even be identified such that the defense would know who to examine as to those communications.

II. THE COURT SHOULD EXCLUDE THE HARGREAVES SCREENSHOTS

The Court should also exclude the Hargreaves Screenshots. These appear to be selective screenshots taken of chats on WhatsApp, and the government has not provided either access to a native file or any certification from the messaging provider as to the authenticity of the logs.

While WhatsApp does not allow as much latitude as Telegram to delete messages, a participant can still choose to delete a message “for me”—which means it will no longer show on that participant’s screen, even though others might have it. *Frequently Asked Questions: How to Delete a Message*, WhatsApp (last accessed Feb. 15, 2021), <https://faq.whatsapp.com/web/chats/how-to-delete-messages/?lang=en>. Further, the documents

⁷ E.g., GX4009–10 (embedded audio file inaccessible); GX4003–04 (embedded excel, key, pdf, and numbers files inaccessible).

are patently incomplete—the majority are one or two screen-shot excerpts from evidently longer chats, though the rest of the chat is either unproduced or the Government intends to avoid introducing proper context. Additionally, some of these exhibits are entirely illegible (GX4119–20), while another does not even contain the chat heading to identify the participants (GX4121). These exhibits lack any indicia of authenticity, and should be excluded.

CONCLUSION

For the foregoing reasons, the Court should exclude the Eaze and Hargreaves Telegram Chats and the Hargreaves Screenshots.

Dated: February 16, 2021

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Annex A

No.	GX Number	Description	Bates / File Source
1.	301	3/2/2018 Akhavan-Patterson Telegram Chat	EZCS1_0018782
2.	302	Easycompany Telegram Chat	EZCS1_0002182 - EZCS1_0002270
3.	303	Heads of Depots Telegram Chat	EZCS1_0003315 - EZCS1_0003321
4.	304	Eaze cs Telegram Chat	JW_000001
5.	305	Alex Shah Telegram Chat	JW_000017
6.	306	CC Telegram Chat	JW_000019
7.	307	CC - DH, BW, JP Telegram Chat	JW_000064
8.	308	Chargebacks Telegram Chat	JW_000066
9.	309	CVV Telegram Chat	JW_000074
10.	310	Deleted Account Telegram Chat	JW_000080
11.	311	Deleted Account Telegram Chat	JW_000081
12.	312	Deleted Account Telegram Chat	JW_000086
13.	313	Descriptor Telegram Chat	JW_000093
14.	314	Easycompany Telegram Chat	JW_000094
15.	315	Eaze CC Strategy Telegram Chat	JW_000125
16.	316	Eaze CC Tech Support Telegram Support	JW_000143
17.	317	Eaze CC Tech Support Telegram Chat	JW_000212
18.	318	Eaze CC Tech Support Telegram Chat	JW_000272
19.	319	Eaze Credit Cards Telegram Chat	JW_000293
20.	320	HTH CC troubleshooting Telegram Chat	JW_000338
21.	321	integration Telegram Chat	JW_000339
22.	322	Jim, John, Medhat Telegram Chat	JW_000348
23.	323	JW Epply Telegram Chat	JW_000355
24.	324	Paysafe Telegram Chat	JW_000358
25.	325	Telegram Call Log	JW_000364
26.	326	Eaze Depots Telegram Chat	EZCS1_0011037
27.	327	Eaze Depots Telegram Chat Screenshot	EZCS1_0234416
28.	328	Marty-Ray Telegram Chat	EZCS1_0007590
29.	4001	Eaze cs	USAO_41003
30.	4002	Eaze cs (pdf version)	USAO_41003-A
31.	4003	Olliebaba	USAO_41004
32.	4004	Olliebaba (pdf version)	USAO_41004-A
33.	4005	Christian Chmiel	USAO_41005
34.	4006	Christian Chmiel (pdf version)	USAO_41005-A
35.	4007	Kate'nRuben !	USAO_41006
36.	4008	Kate'nRuben ! (pdf version)	USAO_41006-A
37.	4009	Ruben Weigand	USAO_41007
38.	4010	Ruben Weigand (pdf version)	USAO_41007-A
39.	4011	Project X Telegram Group	USAO_41008

40.	4012	Project X Telegram Group (pdf version)	USAO_41008-A
41.	4103	Phone Data: WhatsApp Chat Thread with Jawbreaker	USAO_00041465-002
42.	4119	Phone Data: Ruben Weigand WhatsApp Chat Screenshot	USAO_00041465-018
43.	4120	Phone Data: Ruben Weigand WhatsApp Chat Screenshot 2	USAO_00041465-019
44.	4121	Phone Data: Ruben Weigand WhatsApp Chat Screenshot 3	USAO_00041465-020
45.	4122	Phone Data: Christian WhatsApp Chat Screenshot	USAO_00041465-021
46.	4123	Phone Data: WhatsApp Chat Screenshot with Jawbreaker 2	USAO_00041465-022
47.	4124	Phone Data: WhatsApp Chat Screenshot with Tanya Bubbles	USAO_00041465-023
48.	4125	Phone Data: WhatsApp Chat Screenshot with Tanya Bubbles 3	USAO_00041465-024
49.	4126	Phone Data: WhatsApp Chat Screenshot with Tanya Bubbles 4	USAO_00041465-025